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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report of the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1991/38

Addendum

Visit by the Special Rapporteur to Indonesia and East Timor

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Introduction

1. By a letter dated 1 February 1991, the Government of Indonesia extended an invitation to the Special Rapporteur appointed by the Commission on Human Rights to examine questions relevant to torture to visit that country; by a letter dated 9 August 1991 the Government accepted the suggestion that the visit would "include the territory of East Timor". The visit took place from 4 to 16 November 1991; it included meetings, discussions and visits in Jakarta (from 4 to 8 and from 14 to 16 November), and meetings, discussions and visits in Dili, East Timor (from 11 to 13 November). At a rather late stage, on 14 October 1991, the Special Rapporteur requested the Indonesian authorities to include the province of Aceh in his visit, in the light of reports which he had received containing allegations of torture there. However, by letter dated 25 October 1991, the Government turned down that request, "due to the shortage of time and the heavy schedule of the officials concerned". The Government nevertheless added that "it would be pleased to consider arrangements at a more convenient time".

2. The meetings held in Jakarta are described in section I of the present report. Section II describes the background and legal and institutional framework in which the visit took place. The visit to East Timor is described in section III, and section IV contains the Special Rapporteur's conclusions and recommendations.

I. MEETINGS IN JAKARTA

3. In Jakarta, the Special Rapporteur was received twice (on 4 and 16 November 1991) by the Minister of Foreign Affairs, Mr. Ali Alatas. He held discussions with the Coordinator Minister for Political and Security Affairs, Mr. Sudomo, the Minister of Interior, Mr. Rudini, the Attorney-General, Mr. Singgih, the Chief of the Prisons Service at the Department of Justice, Mr. A. Sanusi Has, the Commander of the Indonesian Armed Forces, Gen. Try Sutrisno and the Chief of National Police, Lt. Gen. Kunarto. The Special Rapporteur also met and held informal discussions with several directors general of the Ministry of Foreign Affairs, and in particular the Director General for Political Affairs, Mr. S. Wiryono, the Director General for Socio-Cultural Relations and Information Affairs, Mr. P. Demanik, the Director General of International Organizations, Mr. H. Wayarabi and the Head of Research and Development Agency, Mr. S. Hadipranowo.

4. Two of the officials with whom the Special Rapporteur had requested to hold discussions were unavailable: the Minister of Justice was out of the country and the Chief Justice of the Supreme Court of Indonesia conveyed to the Special Rapporteur that he saw no point in meeting with him since the Special Rapporteur had organized several meetings with representatives of the executive branch from whom he could obtain all the information he needed.

5. In addition to meetings with officials, the Special Rapporteur also met and held discussions with representatives of several non-governmental human rights organizations. In particular, he held lengthy discussions with the

Director of the Institute for Defence of Human Rights (Lembaga Pembela Hak-Hak Azasi Manusia), Mr. H. Princen, and with the Director of the Indonesian Legal Aid Foundation (Lembaga Bantuan Hukum Indonesia), Mr. Abdul Hakim G. Nusantara. The Special Rapporteur also had an informal meeting with a representative of a group of former high-ranking politicians, intellectuals and officials known as "Petition 50", considered by the authorities as a non-authorized opposition movement. The Special Rapporteur was informed by these persons of the human rights situation prevailing in the country and the difficulties faced by them in carrying out the task of protecting human rights. It was alleged that the rights to freedom of expression and association were widely violated in the country, and that many other human rights violations originated from, or were linked to, the failure by the authorities to respect these two fundamental freedoms.

6. The Special Rapporteur was also invited to attend a meeting, organized by the authorities, with several non-governmental organizations dealing with various aspects of national life. The meeting was attended by representatives of Kowani (the Indonesian Women's Congress), the "Participatory Development Forum", the Indonesian Labour Association, the Indonesian Youth National Committee and the Bina Swadaya, an organization oriented towards development questions. The participants briefed the Special Rapporteur about their organizations' activities and about the general situation in the country. The Special Rapporteur was further invited to attend a meeting, organized by the Ministry of Foreign Affairs, with senior officials of the Ministry of Foreign Affairs and the Ministry of Justice, a member of parliament, the director of the Centre for International Studies, two university law professors and a representative of the Women's League.

7. On 7 November 1991, the Special Rapporteur visited the prison of Cipinang, the largest prison in the Jakarta area. He was received and briefed by the prison director, Mr. Nurdin Nursid, and was later able to visit several wings of the prison. The Special Rapporteur was impressed by the cleanliness and decent living conditions, including the provisions for family visits, prevailing in the prison. The Special Rapporteur was able to interview privately several prisoners being held for political offences whose names had been provided by non-governmental organizations; some of them had allegedly been subjected to torture. (The cases of some of these prisoners had, in the past, been submitted by the Special Rapporteur to the Government.) The prisoners interviewed by the Special Rapporteur were Dr. Thomas Wainggai, Mr. Basuki Suropranoto and the remaining four East Timorese political prisoners (whose names were not given). With the exception of the first, who was convicted and sentenced to a 20-year prison sentence after organizing a ceremony during which he raised the flag of a separatist movement in Irian Jaya and who told the Special Rapporteur that he had been treated humanely since his arrest, the prisoners reiterated their allegations of torture during their interrogation by the military. They all said that conditions in Cipinang prison were satisfactory and that the treatment was humane.

8. The Special Rapporteur would like to thank the Government of Indonesia for its invitation to visit that country, thereby manifesting a spirit of cooperation with the Commission on Human Rights. He particularly appreciated

the Government's generosity and hospitality during the visit. The Special Rapporteur also wishes to thank everyone, officials as well as private individuals with whom he held discussions during his visit; their valuable information permitted him better to understand the situation in the country.

II. BACKGROUND AND LEGAL AND INSTITUTIONAL FRAMEWORK

9. After a four-year struggle against the Dutch colonial power, Indonesia formally obtained its independence in 1949 and became a member of the United Nations in 1950. The origin of its statehood dates back, however, to 17 August 1945 when the Republic of Indonesia was proclaimed. The 1945 constitution - reinstated in 1959 by presidential decree - embodies the five principles of pancasila, the official state philosophy. Two of these principles are considered to be of direct relevance to the issue of human rights, viz. the second principle of "just and civilized humanity" and the fifth principle of "social justice". The pancasila is summarized in the preamble to the Constitution in the following way: "We believe in an all-embracing God; in righteous and moral humanity, in the unity of Indonesia. We believe in democracy, wisely guided and led by close contact with the people through consultation so that there shall result social justice for the whole Indonesian people".

10. Article 27 of the Constitution stipulates that, without any exception, all citizens shall be equal before the law and Government, and shall be obliged to uphold that law and Government; and that every citizen shall have the right to work, and to a living, fit for human beings. According to the authorities, this provision contains the same spirit as the Universal Declaration of Human Rights of 10 December 1948.

11. Of the principal international conventions on human rights, Indonesia has ratified only the 1952 Convention on the Political Rights of Women and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. It has signed but not ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It has neither signed nor acceded to the 1966 International Covenant on Civil and Political Rights. The Special Rapporteur asked whether accession to these highly important human rights instruments was under consideration; he was informed that this was the case but that no decision had yet been taken since it was felt that some provisions of the International Covenant on Civil and Political Rights unduly interfered with national legislation.

12. Indonesia became a member of the United Nations Commission on Human Rights in 1991.

13. On 23 February 1991 a Permanent Interdepartmental Committee on Human Rights was established by decree of the Minister of Foreign Affairs. This Committee consists, among others, of representatives of a number of ministries, the office of the Attorney-General, the Intelligence Section of the Armed Forces, the Indonesian Red Cross and a number of non-governmental organizations. Its main task is to formulate recommendations and a national policy on human rights, both for international human rights forums and for domestic matters. The Committee is entrusted in particular with the tasks of evaluating international human rights treaties, holding consultations with

social institutions and human rights organizations, providing an input for Indonesian delegations to United Nations bodies dealing with human rights and preparing for the establishment of a national commission on human rights. The Committee is responsible to the Minister of Foreign Affairs and is headed by the Director-General for Political Affairs of the Ministry of Foreign Affairs.

14. Other measures taken to enhance the awareness of human rights are the organization of human rights seminars, including one held in 1990 in cooperation with the United Nations Centre for Human Rights, the setting up of programmes such as "public prosecutors entering the villages" and "judges entering the villages", the extension of legal aid facilities and the training and upgrading of law officers, public prosecutors and the judiciary.

15. The armed forces have a predominant position in Indonesian society. A dual role is assigned to the army: it not only has the task of ensuring external and internal security, but also that of contributing to the social and economic development of the population. The police are part of the armed forces. The Special Rapporteur was informed that military status for the police was preferred over a civilian one as the former illustrated the dual role of the army. Introduction of a civilian police is not under consideration. A member of the armed forces who has committed a crime or abused his authority would stand trial before a military court. Members of the police, therefore, cannot be tried by a civilian court if they have encroached upon the rights of a civilian.

16. The armed forces' first task receives particular emphasis in those parts of the country where irredentist forces are active. At present, Aceh, East Timor and Irian Jaya may be mentioned in this respect, and it is with regard to these areas in particular that the Special Rapporteur has received many communications alleging the practice of torture.

17. Article 12 of the 1945 Constitution empowers the President to declare a state of emergency. Under this provision, the prerequisites for and results of a state of emergency shall be established by legislation. A law concerning states of emergency was consequently adopted. Although in the past various decrees concerning states of emergency have been issued, their legal status has been unclear. According to the authorities, the Operational Command for the Restoration of Security and Order (KOPKAMTIB), established in 1965 in the aftermath of the attempted coup d'etat of 30 September, did not operate under a state of emergency or martial law, although its specific function was the prevention of subversion and infiltration.

18. KOPKAMTIB had far-reaching powers, including the authority to detain people without trial. The Government decided to abolish KOPKAMTIB in September 1988, in view of the widespread criticism it evoked and to replace it by the Coordinating Board for the Development of National Stability (BAKORSTANAS) with more restricted powers. The Special Rapporteur was informed that at present no part of the territory was under a state of emergency and that, therefore, normal legislature was applicable throughout the country.

19. To a large extent, Dutch colonial law has remained applicable since independence and is only gradually being supplanted by new legislation. In 1981, a new code of criminal procedure was enacted, usually called KUHAP (Act No. 8/1981). A commission has been established to draft a new penal code which will eventually replace the Criminal Code of 1918 (KUHP). The Special Rapporteur was informed that the drafting process was nearly completed and that the Code would probably be adopted by Parliament in the course of 1992.

20. It is, in particular, the Code of Criminal Procedure which determines the rights of the individual during the different stages of investigation and trial. According to the Elucidation (explanatory comment) on the Code, it upholds the principle of respect for the nobility of human dignity and prestige which is also laid down in the Law on the Basic Provisions of the Judiciary Power (Act No. 14/1970).

21. Except in cases where a person is caught actually committing a crime, an arrest may only be made by a police officer upon the presentation of an arrest warrant (art. 18). The warrant must specify the suspect's identity and briefly summarize the reason for his arrest, including the crime he is suspected of having committed. A copy of the arrest warrant must be delivered to the relatives of the suspect immediately after his arrest. If a person is caught in flagrante delicto, he must immediately be handed over to the police. The Special Rapporteur was informed that this must be done within 24 hours. The arrest warrant is valid only for that period. If the police investigator is of the opinion that the suspect should remain deprived of his liberty to prevent him from running away, damaging or destroying evidence and/or repeating the criminal act, the investigator must issue a detention order (art. 21). Such an order is valid for a maximum of 20 days. If the investigator has not finalized his investigation within that period, he must ask the public prosecutor to extend the detention by a term which may not exceed 40 days. After this term has expired, detention can only be extended, by an order of the presiding judge of the district court, by a maximum of two times 30 days. The maximum period, therefore, for which a person can be detained before being brought to trial is 120 days.

22. According to article 54 of the Code, a suspect or defendant has the right to legal assistance from one or more legal advisers during the whole period and at every level of his examination. Under article 56, he is free to choose his own lawyer. If he has not chosen one, a lawyer must be assigned to him if he is suspected of or charged with having committed a crime which carries a death sentence or a prison term of 15 years or more, or if he is unable to pay a lawyer and is liable for a prison term of five years or more. Contact between the suspect and his lawyer is guaranteed from the moment of arrest and during the whole investigation. The authorities are entitled to supervise the contact without listening, however, to the content of the discussion. Moreover, a suspect has the right to be visited by his relatives and to contact and be visited by his personal doctor. Incommunicado detention, in whatever form, is ruled out by KUHAP.

23. If a person is of the opinion that he has been illegally arrested or is being kept under detention in violation of the law, he or his relatives can initiate pre-trial proceedings to have the arrest or detention declared illegal; he can also ask for compensation and rehabilitation. The judge must

decide within seven days after the request has been made. It should be pointed out that, at the level of the pre-trial hearing, only the legal validity of the detention can be questioned; whether the conditions under which the suspect is held are in conformity with the law is an issue which can only be brought up at the trial. The pre-trial proceedings can be compared to a certain extent with the habeas corpus procedure in common-law countries, especially since the right to initiate such proceedings is also given to the relatives.

24. Whenever a suspect is interrogated by the police, his lawyer is entitled to watch and listen to the examination. In the case of a crime against the security of the State, the lawyer may be present but may be prevented from listening in. Article 117 of KUHAP explicitly states that information given by a suspect and/or witness to an investigator shall be given without pressure from whomsoever and/or in any form whatsoever. Statements of suspects and witnesses must be recorded in the investigator's report in the minutest detail and in their own words. The report must be signed by the investigator and the person who made the statement. If the latter refuses to do so, the report must contain the reason for this refusal.

25. After the police have completed the investigation, the file is handed over to the public prosecutor who may return it to the police if he deems it to be incomplete. The prosecutor does not have the authority to carry on further investigations on his own; he can only decide whether the suspect will be prosecuted and what charge will be brought. During the investigation process the police must keep the prosecutor informed, but the prosecutor is not entitled to order the investigation stopped or the suspect released during the first period of 20 days after the suspect has been arrested.

26. Trials are public except in cases concerning morals or when the defendant is a child. A confession alone is not sufficient proof to convict a suspect but must be supported by at least one other piece of evidence. Nowhere is it mentioned that a statement made under pressure should be dismissed as evidence. On several occasions, however, the Special Rapporteur was informed that if a judge is of the opinion that a statement was not freely made, he should not base his decision on it.

27. A suspect who has been convicted by a district court has the right of appeal. If the appelate or high court confirms the sentence, a defendant can file a request for cassation with the Supreme Court.

28. It will be clear from the foregoing that KUHAP contains many time-limits and formalities which have to be observed and which provide a suspect with safeguards for his basic rights. It has been said that, on the other hand, KUHAP does not contain any legal sanctions in case such safeguards are violated. Neither the prosecutor nor the judge can order an investigation by an impartial authority as to whether the argument is well-founded that, for example, a statement has been extracted from a suspect or a witness under duress. The only remedies provided by KUHAP are the decision during pre-trial proceedings that an arrest or a detention was illegal and that the suspect must be released and is entitled to compensation, and the dismissal of evidence during trial.

29. Before considering whether KUHAP is in conformity with generally accepted international standards, it must be pointed out that KUHAP, (art. 284, para. 2) allows a (temporary) exception to criminal procedure to be made in a number of laws, the most important of which is the Law on the Combat against Subversive Activities, usually called the Anti-Subversion Law. This law, which originally was a presidential decree of 1963, was transformed in 1969 by parliamentary approval into a statute (Law No. 5/1969).

30. The definition of subversive activities in chapter 1 of the Law is very broad and loose. Moreover, it is not necessary that the acts concerned actually have the effect of endangering the security of the State; it is sufficient that they might have that effect. For this reason the Anti-Subversion Law has been severely criticized in Indonesia as well as abroad.

31. As far as procedure is concerned, the most drastic exception to the provisions of KUHAP is the provision that the Attorney-General (the chief of the national prosecution service) has the authority to order the detention of a suspect for a maximum of one year (art. 7). In this case no pre-trial proceedings can be started nor can such detention be subjected to any other form of judicial control. The Special Rapporteur was informed that the decision to charge a person with having committed crimes mentioned in the Anti-Subversion Law or with crimes under the Penal Code (which also contains crimes against the security of the State and against public order) must be made by the Attorney-General and not by the local public prosecutor. He was also informed that as long as this decision has not been made, the provisions of KUHAP are applicable.

32. It is a matter of controversy in Indonesia whether the Anti-Subversion Law should be maintained once the new Penal Code is enacted. Not only is its constitutional legality disputed, but the broad powers given to the authorities and the loose and vague definition of subversive activities have given rise to much criticism. It has been submitted that crimes against the security of the State and against public order should be punishable only under the normal Penal Code. No judicial body so far has declared the Anti-Subversion Law to be invalid while a considerable number of people have been convicted under it. In the last few months a number of people from Aceh province, where there has been serious civil unrest, have been sentenced for having carried out subversive activities.

33. What is striking about Indonesian criminal procedure is the rigid distinction between its various phases and between the various authorities involved, as well as the passive role assigned to the public prosecutor and the judiciary. Criminal investigation is exclusively a matter for the police. During the first 20 days of detention no other authority is involved unless pre-trial proceedings are started by the suspect or his relatives. Although in general KUHAP must be deemed to be in conformity with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by consensus by the General Assembly in its resolution 43/173 of 9 December 1988), this absence of judicial control during the initial period of arrest seems to be at odds with principle 37 which reads:

"A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody."

34. Since torture usually occurs during the initial phases of an investigation, such external supervision of the lawfulness of the detention and treatment of a detainee must be seen as an important protection measure for the person's basic human rights, provided the judicial or other authority takes its responsibility seriously. Another such protective element is found in principle 29 which states that in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. The Special Rapporteur is not aware of any existing regulation in Indonesia implementing this principle, with regard to arrested persons who are held in police detention or are awaiting trial elsewhere.

35. Even if it is taken into account that a detained person can challenge the lawfulness of his detention in pre-trial proceedings, a procedure which is in conformity with principle 32, the conditions under which he is detained and the treatment he is given cannot be dealt with during such proceedings. The Special Rapporteur was informed that, in cases of alleged torture or maltreatment, the detainee or his relatives have to file a complaint with the police. This can hardly be called an effective remedy since it is that same police which is said to have maltreated the suspect. Here again the provisions of principle 33, dealing with complaints about torture or maltreatment, do not seem to be fully met. In particular, paragraph 4 of principle 33 is relevant in this respect. It states that every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. The Special Rapporteur is not aware of any provision entitling a suspect to bring such a complaint before a judicial or other authority if the police has rejected it, nor is there any provision which obliges the public prosecutor or the judge to hear and see the suspect when deciding on the extension of a detention order after 20 or 60 days, respectively. The public prosecutor or the judge will often be unaware of the fact that the suspect has complained about having been tortured.

36. The judge is only confronted with the issue of torture or maltreatment when he is evaluating the evidence provided by the police. A member of the judiciary told the Special Rapporteur that it was very difficult to decide whether such evidence had been obtained by extortion at such a late stage, especially if a statement had been signed by the suspect. He also said that in a case where evidence was alleged to have been obtained under torture, he could not order an investigation but had to rely on the contents of the file and the proceedings during the trial.

37. The Special Rapporteur also received information according to which it was not exceptional for a person to be arrested by the military and detained for a certain period in military barracks before being handed over to the police. If this transfer does not take place within 24 hours after arrest, such detention is clearly illegal. Evidence gathered during such an illegal detention is obtained in an irregular way. It was submitted that such evidence nevertheless finds its way into the file and that there is no provision which forbids the judge from taking such evidence into consideration.

38. The Special Rapporteur was also informed that it was not exceptional in areas where there was civil unrest, for people to be arrested by the military, kept in detention for a certain period during which they were interrogated (sometimes under torture), and subsequently released. Such practices which, during the existence of KOPKAMTIB, were not in violation of the law, are manifestly illegal at present. Pre-trial proceedings could provide a remedy, but it was said that in practice such remedies were rarely used, especially as under such circumstances access to a lawyer was virtually impossible.

39. As was said earlier, the right to have a lawyer and to be visited by one's relatives must be deemed to be an important barrier against the practice of torture. It was submitted, however, that in view of the extreme scarcity of defence lawyers this preventive mechanism did not function properly. During his visit, the Special Rapporteur talked to persons who were serving sentences of more than 10 years. Some of them had seen their lawyers only once or twice before their trial or had had no legal assistance at all. It was also said that often lawyers were not informed of a forthcoming interrogation or were only informed very late, thereby making it virtually impossible for them to attend the interrogation.

40. It was also said that although in theory KUHAP afforded a suspect all the protection he needed, in practice such guarantees were not effective since the machinery to implement them was lacking. In this respect attention was drawn to the role of the judiciary. It was said that the judiciary had little understanding of the role it could play in combating torture by ensuring that those who practise torture are punished. According to these sources, in spite of the fact that the judiciary had no role to play in the investigation proceedings, it could be much more alert when, during the trial, allegations of torture were made by the defence.

41. In his general report the Special Rapporteur elaborated on the role the judiciary has to play in the struggle against torture. He therefore deeply regrets that the President of the Supreme Court, whom he had asked to see, was of the opinion that a meeting with him would not be useful since torture practices concerned mainly the executive branch. The Special Rapporteur can only conclude that such a reaction seems to confirm the impression that, in Indonesia, the judiciary is not aware of the important function it has in suppressing and eradicating torture. A vigilant judiciary is indispensable if the struggle against torture is to be successful.

42. Another element which has drawn the attention of the Special Rapporteur is the fact that the public prosecutor's office has no active role in criminal investigations. In most countries criminal investigations are carried out

either under the responsibility of the prosecutor or of an examining magistrate (juge d'instruction). According to Indonesian legislation the role of the prosecutor with regard to the investigation is marginal. Article 27 of Act No. 5/1991 concerning the prosecution service of the Republic of Indonesia states that, in filing criminal matters, the prosecution service shall have the duty and authority, inter alia, to institute a prosecution in a criminal case and to ensure, in cooperation with the investigator (i.e., the police), that case dossiers are complete before submission to the court; this includes carrying out any additional examinations that might be necessary. Since investigation and prosecution are indissolubly linked and, in particular, as there is no hierarchical link between the prosecutor and the police, a greater involvement of the prosecutor's office in crime investigation would seem logical. The police has to keep the prosecutor informed about the investigations which have been initiated but, at least during the initial phase, the prosecutor cannot give any guidance as to what is needed for the prosecution.

43. The Minister of Justice is responsible for the prison system through the Directorate-General for Correction. The prison system is based upon the concept of resocialization and correction in conformity with a policy document adopted in 1964. Convicted prisoners and detainees awaiting trial should be separated. The Special Rapporteur was informed that, whenever possible, persons awaiting trial during the investigatory phase are held in police detention centres. Once the investigation has been terminated they are transferred to "houses of correction" (a kind of pre-trial jail). Only in exceptional cases are they held in prisons, e.g. for reasons of security.

44. The Special Rapporteur was also informed that prisons were regularly visited by members of the judiciary, who have to supervise the execution of the court's decisions. Whenever prison personnel abuse their authority (e.g. by maltreatment), the inmates have the possibility of filing a complaint with the visiting judge.

45. The Special Rapporteur is not in a position to give an opinion on the question of whether the social reintegration policy is successful. He has received information from reliable sources, however, that in general the treatment of prison inmates is reasonable and acceptable and that there are rarely complaints of serious maltreatment. In one case, however, he was told that the inmates in a particular prison were regularly beaten by prison personnel.

III. VISIT TO EAST TIMOR

46. The question of East Timor is an unresolved item on the agenda of the United Nations. In December 1975 the Indonesian armed forces intervened in a decolonization process which had started in 1974 after the authoritarian regime of President Caetano in Portugal, the colonial power, was toppled. During this decolonization process a highly confused and complex situation developed, which Portugal was no longer able to control. After the Indonesian invasion, the Security Council and the General Assembly adopted various

resolutions urging Indonesia to evacuate the territory. Indonesia, however, maintained that the majority of the East Timorese population had expressed the wish to integrate the territory into the Republic of Indonesia. On 17 July 1976 this integration was formalized and East Timor was declared Indonesia's twenty-seventh province. The United Nations never recognized Indonesia's sovereignty over the territory, although a number of Member States did so.

47. Through the good offices of the Secretary-General the two parties to the dispute agreed on a visit to East Timor by a delegation from the Portuguese parliament. The visit was scheduled to take place in the first two weeks of November 1991 but at the end of October it was announced that the visit would be postponed since no agreement could be reached on the inclusion of one foreign journalist in the Portuguese delegation.

48. The Special Rapporteur's visit to East Timor was scheduled to take place from 10 to 13 November 1991. Originally, therefore, it was to coincide with the visit of the delegation of members of the Portuguese parliament. The cancellation of that visit led to an atmosphere of increased tension, including some violent incidents in late October. In the event, the Special Rapporteur's visit had to start one day later, due to the cancellation of two flights on 10 November, and it was, to a very large extent, overshadowed by the tragic events of 12 November. Even though these events do not, strictly speaking, fall directly within his mandate, which concerns questions relevant to torture, the Special Rapporteur feels that, as a representative of the United Nations Commission on Human Rights who happened to be on an official visit at a short distance from the scene of the incidents, he cannot refrain from describing and evaluating what he saw and heard during and after the events.

49. The Special Rapporteur's programme for the visit to East Timor included meetings with the Governor of East Timor, Mr. M. Viegas Carrascalao, the Military Commander Brig. Gen. R.S. Warouw, the Chief of District Military Command (Kodim), Lt. Col. Wahyu, the Attorney of East Timor, Mr. Bennyto, the Chief of Court, Mr. M.A. Lasangke, and a meeting with Bishop C.F.X. Belo. The programme also included visits to Bekora prison and two former detention places, Wisma Senopati I and II, and meetings with several former detainees whose cases had been submitted by the Special Rapporteur to the authorities as having allegedly been subjected to torture.

50. Due to the late arrival of the Special Rapporteur in East Timor some of the meetings had to be merged, or shortened. The Wisma Senopati I detention place, which was reported to the Special Rapporteur to be a place where several people had been tortured, turned out to be the residence of the head of local security; Wisma Sinopati II had also been turned into a residence. The visit to Bekora prison took place on 12 November. The Special Rapporteur was able to interview privately the following convicted detainees: Domingo Seiscas, Luis Maria da Silva, Manuel Fejera, Augusto Noronha and Manuel Constantino Cornelio da Piedade. The first two confirmed having been tortured during their interrogation. Messrs. Fejera and Noronha, who are common-law prisoners, were brought to be interviewed by

the Special Rapporteur even though he did not ask to see them. They had no complaints of ill-treatment. Mr. Cornelio da Piedade was sentenced to one and a half months' imprisonment. He complained that during the first 14 days of imprisonment he was held in a cell and was not allowed to leave it. When the Special Rapporteur asked to interview detainees who had allegedly been subjected to torture but had not yet been put on trial, he was told that those persons were still the subject of legal proceedings and it was therefore impossible to see them.

51. Other meetings scheduled to take place on 12 November 1991 included a meeting with the Military Commander, a combined meeting with the Chief of Court and the Attorney, a lunch hosted by the Military Commander, a meeting with Bishop Belo at his residence, visits to "projects" carried out by the armed forces together with the local population, and a dinner at the Governor's residence.

52. During a meeting with the Governor in the afternoon of 11 November, he made mention of an incident which had taken place on 28 October in or near Motael church and had cost the lives of two people. According to the Governor, this incident could have been the result of disappointment and frustration over the postponement of the parliamentary visit, which had just been announced.

53. On 12 November, when the Special Rapporteur was on his way to a meeting with the Military Commander of East Timor, a serious and tragic event took place, to which the Special Rapporteur was not an eyewitness. In the early morning a mass was celebrated in Motael church in commemoration of one of the victims of the incident of 28 October which was attended by a great number of people. They then proceeded to the cemetery of Santa Cruz where the victim had been buried. During the march to the cemetery banners were unfolded and the flags of Portugal and of Fretilin (Frente Revolucionária de Timor Leste Independente) displayed. When the crowd reached the cemetery, security troops opened fire. A great number of people were killed or injured. Information about what sparked off the shooting differs widely. According to the authorities the crowd was disorderly, demolishing shops and houses and using weapons, including a hand grenade, against members of the security forces. Others claimed that there was no provocation from the crowd. The number of persons killed was given by the authorities as 19, whereas Bishop Belo told the Special Rapporteur that between 50 and 60 people had been killed. Many people were seriously injured and were transported to hospitals. The Special Rapporteur was informed that there were also arrests in connection with the incident, the number of which was given by the authorities as 42 and by Bishop Belo as about 80.

54. After his return to Jakarta the Special Rapporteur had a meeting with the Commander of the Armed Forces, General Try Sutrisno, on 14 November. During this meeting the Special Rapporteur urged the Commander to ensure that all people under detention would be treated humanely. The General replied that they would be treated in accordance with the law, which was in conformity with international standards. During a press conference he gave later that same day, General Sutrisno made mention of the Special Rapporteur's request and of the reply he had given.

55. During a meeting later that week with the Minister of Foreign Affairs, who had just returned from a conference in Seoul, the Special Rapporteur reiterated his request that detainees be treated humanely. He also urged the Minister to allow the representatives of the International Committee of the Red Cross in Dili to visit the wounded in hospital and the detainees in the military camp, permission which up to that moment had been withheld. The Minister said that a thorough investigation would be held. The Special Rapporteur suggested that, in order to strengthen the credibility of the investigation, international observers be invited as monitors. He made reference to a statement, made by General Sutrisno during his press conference of 14 November, that international involvement in the investigation would be tantamount to interference in the internal affairs of Indonesia. The Special Rapporteur maintained that it was within Indonesia's sovereignty to invite, through the Secretary-General's office, international experts to observe the proceedings and the outcome of the governmental investigation.

56. In spite of the tragic events of 12 November, about which he was informed by the authorities at a very late moment, the Special Rapporteur was nevertheless able to carry out his visit as originally planned. During his meeting with the Governor in the afternoon of 11 November, the Special Rapporteur was informed that the Indonesian Government had made large investments to improve the infrastructure in the territory. The number of roads had greatly increased and schools and health centres, including hospitals, had been built; the rate of illiteracy had dropped from 92 per cent in 1975 to 20 per cent. Nevertheless, there was a feeling of discontent, especially amongst the better educated, since no jobs were available for school-leavers. This was particularly true for Dili, whose population had grown from 17,000 in 1975 to 126,000 people. This feeling of frustration and discontent could easily lead to expressions of opposition to the authorities. Another four to five years were needed to attract industry and capital investment.

57. Problems also arose from the different mentalities of the East Timorese people and the armed forces. The military were not always aware that East Timor had had a completely different historical background from the rest of the archipelago.

58. Nevertheless, the Governor had the impression that the number of incidents between the local population and the armed forces was decreasing, although he admitted that sometimes the police intervened with brutality. He was, however, always accessible to the local population to hear complaints. He noted that since 1989 members of the armed forces who had abused their authority had been tried and, in some cases, demoted or dismissed.

59. The military authorities too admitted that there had been cases of torture or other serious human rights violations but assured the Special Rapporteur that everything was being done to prevent their recurrence. The Special Rapporteur was provided with statistical data on the number of members of the armed forces who had failed to carry out their functions and had consequently been punished or disciplined. Mention was made of 215 cases, 115 of which involved criminal acts.

60. It was stressed, however, that the most important task of the armed forces was to develop the territory; joint projects with the local population had been undertaken, such as the building of churches and community centres, for which the army provided the materials and the local population the labour force. The armed forces, however, also had to cope with those elements which tried to sow unrest and exploited feelings of discontent and frustration. In carrying out this task a large amount of self-control was required from the military.

61. The Attorney for East Timor explained to the Special Rapporteur that his office could only deal with cases in which preliminary investigations had been carried out by the police; it had no role with regard to arrests which had been made in violation of the law, including arrests carried out by the security forces and warrantless arrests. In such cases the relatives had to initiate pre-trial proceedings and ask for compensation. Likewise, in cases where the suspect or a witness maintained that a statement had been extracted by torture, the Office of the Attorney had no investigative power of its own; the Attorney could only ask the investigator whether the allegation was true or not and it was up to the judge to make a decision.

62. The President of the District Court of Dili told the Special Rapporteur that it was extremely difficult for a judge to conclude that torture had been practised since he had to rely on police reports and could not carry out an investigation under his own responsibility.

63. Following a meeting with Bishop Belo in the morning of 13 November, during which the Bishop gave an account of the events of the previous day, the Special Rapporteur received in his hotel several persons whose names had been submitted to the Government as people who had allegedly been subjected to torture while in the custody of the security forces. The Special Rapporteur met privately with the following persons: Justina Moniz, Adao da Purificaçao, Agostinho Pereira Martins, Acacio Martins, Carlos da Purificaçao and Abilio Mesquita. Three of them gave a detailed account of the torture to which they had been subjected, especially soon after arrest and during interrogation. Another said that he himself had not been ill-treated, but that he was detained with others who had been tortured. Two persons said they had not been ill-treated. None of them had been charged or tried. All of them told the Special Rapporteur that they were told by the authorities to appear before the Special Rapporteur. They all seemed afraid and some expressed anxiety at being rearrested and subjected to torture after the Special Rapporteur left East Timor. The Special Rapporteur told them that the fact of publishing their names in a United Nations report should constitute a guarantee against any harassment.

64. As the Special Rapporteur was about to leave East Timor on 13 November 1991, he requested to be taken, on the way to the airport, to the hospital where dozens of wounded were being treated after the incidents of the previous day, in order to express sympathy with the wounded. This request was refused, with the explanation that a visit by the Special Rapporteur to the wounded would be interpreted as a "United Nations endorsement of anti-government" forces and could lead to more rioting.

65. The Special Rapporteur wishes to express his appreciation and gratitude to Governor Carrascalao for his hospitality and frankness. He also wishes to express his sympathy with Bishop Belo for his commitment to the cause of his community. The Special Rapporteur regrets being obliged to put on record his feelings of astonishment and disappointment at not having been informed promptly by the military authorities of East Timor about the incidents of 12 November 1991.

IV. EVALUATION, CONCLUSIONS AND RECOMMENDATIONS

66. The administration of justice in Indonesia is a controversial, and to a certain extent, politicized issue. This is borne out by the fact that there are two bar associations, one of which is registered with, and recognized by, the Government, whereas the other calls itself independent since it finds the conditions for registration with the Ministry of the Interior too restrictive, and therefore incompatible with the independence a professional organization should enjoy.

67. In the same way there exist two legal aid institutes, one registered with the Government and one independent. The Special Rapporteur was informed that the "independent" institutions often encountered difficulties and even obstruction from the authorities.

68. This politicized climate is responsible for the fact that the Special Rapporteur was presented with completely different, and therefore inconsistent, versions of the way in which the provisions of the Code of Criminal Procedure (KUHAP) were actually applied in general and on the occurrence of torture in particular. As a consequence, the Special Rapporteur has not been able to get a clear insight into all the legal issues. It has remained unclear to him, for instance, whether the provisions of KUHAP are formally applicable when the Attorney-General has decided that a suspect will be prosecuted under the Anti-Subversion Law. An independent expert told him that the differences between the Anti-Subversion Law and KUHAP refer mainly to the detention period (up to one year in the case of the former and 120 days under the latter) and the investigative authority (under the Anti-Subversion Law the Attorney-General, under KUHAP the public prosecutor), but that for any other aspect of the detention, KUHAP was applicable. The authorities also told the Special Rapporteur that some elements of KUHAP were applicable in cases where a person was suspected of having committed acts punishable under the Anti-Subversion Law, for example the right to have his relatives informed of his arrest and to be visited by them or the right to legal assistance. Other sources, however, informed the Special Rapporteur that the conditions under which arrests were made and investigations carried out under the Anti-Subversion Law were in any case at odds with KUHAP and therefore made the application of the other KUHAP provisions irrelevant.

69. In making his evaluation, however, the Special Rapporteur does not need to rely only on information passed on to him during his visit to Indonesia; he can also make use of other documentation, for example the country report on the human rights situation in Indonesia contained in the annual report on human rights presented by the United States Department of State to Congress.

The 1990 report states that "the Agency for Coordination of Assistance for the Consolidation of National Security (BAKORSTANAS) operates outside KUHAP procedures and has wide discretion to detain and interrogate persons thought to be a threat to national security. Indonesian law does not provide for the right to judicial review of such actions or for the right to protection or legal aid for the detainees". The last sentence seems not to be correct. Formally, the relatives of an arrested person have the right to initiate pre-trial proceedings where the legality of the arrest may be questioned. An independent expert told the Special Rapporteur, however, that the institution of pre-trial proceedings was still underdeveloped. Non-governmental sources were of the opinion that pre-trial proceedings were hardly ever effective since the courts invariably gave in to the argument that the armed forces were acting for a good cause. The people, therefore, had lost their confidence in the institution even before it had come to full development.

70. There is no controversy surrounding the fact that irregular arrests, i.e. arrests not in conformity with KUHAP, are at present illegal. This was unequivocally confirmed by all authorities. Nevertheless, the Special Rapporteur met a number of persons who were arrested without warrants and who had been held by the military for a period exceeding 24 hours, were never transferred to the police and were eventually released, sometimes after having been tortured. Since the abolition of KOPKAMTIB, such practices are no longer legal.

71. The Special Rapporteur was informed that, in other cases, persons arrested under such circumstances were brought to trial and sentenced. It was said that this occurred frequently in areas where insurgent movements were active such as Aceh, East Timor and Irian Jaya. Activists in these areas are usually referred to by the authorities as members of the GKP (Gerakan Pengacau Keamanan - Disturbance of the Peace Movement).

72. An upsurge of violence in Aceh led to mass arrests during the last months of 1990 and the beginning of 1991. A number of trials were held in the spring of 1991 and others are still pending. All persons standing trial were charged with crimes under the Anti-Subversion Law and were almost without exception sentenced to long prison terms. Non-governmental organizations have severely criticized the investigation proceedings and the trial proceedings as not complying with the basic provisions of KUHAP. It was alleged that many of the defendants had been subjected to torture; a number of them explicitly stated this during their trials. According to these sources most of the defendants had been arrested without a warrant and had not been informed about the crime they were suspected of having committed. They had been held in military detention places without being allowed visits by their relatives or consultation with a lawyer. They had been provided with legal assistance only at a very late stage, sometimes even after the trial had begun. Lawyers of the Legal Aid Foundation (LBH) who were authorized by the relatives of the suspects to defend their case were not allowed to do so; often, in their place, inexperienced lawyers were assigned who carried out their task to the best of their abilities but were, by definition, less effective.

73. In view of the information received by him, the Special Rapporteur cannot avoid the conclusion that torture occurs in Indonesia, in particular in cases which are considered to endanger the security of the State. In areas which

are deemed to be unstable, like the territories mentioned earlier, torture is said to be practised rather routinely; it is also allegedly used elsewhere, in particular on persons who are suspected of belonging to groups which threaten the State philosophy, e.g. by advocating the creation of an Islamic State. The Special Rapporteur has no reason to doubt that irregular arrests by security agencies are far from exceptional, in spite of the fact that the previous discretionary powers of such agencies have been curtailed. As the Special Rapporteur has said in all his previous reports, torture is most often practised under incommunicado detention. Although incommunicado detention is formally forbidden under Indonesian legislation, such irregular detention creates a situation which is conducive to torture. As the means of redress against such irregular detention, such as pre-trial proceedings, are not effective, the institutional framework necessary to act as a disincentive to torture is missing. This is partly due to the system of KUHAP, which gives the police virtually unrestricted and uncontrolled power during the first phase of the investigatory proceedings.

74. Another factor which was repeatedly pointed out to the Special Rapporteur as one of the chief weaknesses in the structure of the administration of justice is the way in which the judiciary functions: it was said that the judges do not oblige the police and the armed forces to respect the law by vigorously rejecting all forms of illegal arrest and all evidence obtained during irregular detention. An independent expert told the Special Rapporteur that the two most important principles for the protection of human rights included in KUHAP were the presumption of innocence and the right to silence, according to which suspects and witnesses could not be forced to speak. He added, however, that the courts failed to apply those principles in a steadfast manner; he also said that legal provisions were of little help if the courts failed to establish violations of KUHAP. No case of the courts having concluded that a detention was illegal or that a statement was obtained under duress was cited to the Special Rapporteur. Another weak spot in the structure for the prevention of torture can be found in the absence of an independent authority or institution where complaints about torture or maltreatment can be filed.

75. The fact that the police force has complete control over the first 20 days of detention makes it an implausible agency for receiving complaints about torture, since torture usually occurs during the initial phases of an investigation. The fact that most torture is allegedly practised during irregular arrest by the military security agencies also makes the police, as part of these same armed forces, an implausible agency for receiving complaints about irregularities and abuse of power. As well as filing a complaint with the police, Indonesians can in principle send complaints about abuse of power to a post office box; those concerning State authorities are dealt with by the Office of the Vice-President. The ordinary citizen, however, may for various reasons be reluctant to make use of this machinery. The establishment of an agency which is readily accessible and which has investigatory (and prosecuting) powers would undoubtedly strengthen the framework to protect basic human rights.

76. Another element which is not quite clear is whether members of the armed forces, including the police, who have abused their authority are indeed punished. During the meeting with the Coordinator Minister for Political and Security Affairs, the Special Rapporteur was informed that members of the armed forces who abuse their powers are regularly prosecuted and punished; a figure of 5,000 sentenced officials was quoted. Nevertheless, the United States Department of State report for the year 1990 states that in that year there were no known instances of officials being punished for mistreatment of political prisoners or detainees. The Special Rapporteur was told that, whenever the police finds a complaint by a civilian to be well founded, the file is transmitted to the office of the Military Attorney-General; since the suspect would have to stand trial before a military court. This means that no civilian authority is involved in any way in dealing with a complaint filed by a civilian of an alleged encroachment on his fundamental rights. The Special Rapporteur regrets that his meeting with the Military Attorney-General was cancelled as this prevented him from pursuing this issue. It seems to him, however, that a system which places the task of correcting and suppressing abuses of authority in that same institution will not easily inspire confidence. As the Special Rapporteur said in previous reports on country visits, there seems to be no reason whatever why persons belonging to the military should be tried by military courts for offences committed against civilians during the essentially civil task of maintaining law and order. The Special Rapporteur feels that, at the very least, a psychological barrier could be overcome by giving the civil courts jurisdiction over all offences committed by the military which are not strictly service connected.

77. More generally, the Special Rapporteur is of the opinion that basic human rights, which are guaranteed by Indonesian legislation, would be better protected if the rather rigid distinction between investigation, prosecution and judicial control could be loosened by dovetailing the various responsibilities. This could be effected by extending the prosecutor's authority and giving him a greater role and responsibility in the field of criminal investigation. Another possible measure could be a more active role for the courts with regard to ensuring the legality of arrests and the conditions of pre-trial detention. Indispensable as the pre-trial proceedings are as a habeas corpus procedure, they have the disadvantage that the judge cannot act unless such proceedings are initiated by the detainee or his relatives. Such measures would bring the Indonesian legislative and institutional framework more in conformity with the 1988 Body of Principles.

78. In summary, the Special Rapporteur has come to the following conclusion. Basic human rights, including the right to physical and mental integrity, are guaranteed by the Indonesian State philosophy and legislation. Whether these basic rights are actually respected, however, seems questionable, in particular in those areas where there is civil unrest. The authorities told the Special Rapporteur that in those areas there had been heavy investment by the Government to improve the infrastructure and to strengthen economic development. The standard of living had consequently been raised but the distribution of wealth had been uneven and unemployment, especially among the local population, was still high. This led to discontent, to which some aspects of the Government's transmigration policy might have contributed.

According to the authorities, this discontent was exploited for political reasons by irresponsible adventurers and had sometimes led to violence and the use of force which could only be countered by the use of force on the part of the Government.

79. The Special Rapporteur cannot take a position with regard to the political questions involved. He feels, however, that discontent can only be removed by a policy of strict respect for basic human rights, even if those basic rights are not respected in the same way by the other side. He is of the opinion that it is the primary task of a Government to see to it that its own laws are strictly complied with. It is for this reason that the Special Rapporteur, on the basis of the information received by him before and during his visit, has pointed out some weak points in the institutional and legal framework which may hamper the Government in carrying out this primary task.

80. In the light of these considerations the Special Rapporteur wishes to make a number of recommendations:

(a) Accession by Indonesia to the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and ratification of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment are highly desirable;

(b) A greater awareness should be created within the judiciary of the vital role it can play in the enforcement of respect for human rights in general and for the right to physical and mental integrity in particular. The independence of the judiciary should be scrupulously respected;

(c) The responsibility of the independent Attorney-General's office and of the judiciary for the supervision of the legality of arrests and the regularity of criminal investigating procedures should be extended;

(d) An arrested person's right of access to a lawyer, which is guaranteed by the law, should be strictly respected;

(e) All evidence which is obtained in a way which is not in conformity with the law should be dismissed in court;

(f) In view of the lack of clarity as to whether basic human rights are required to be respected under the Anti-Subversion Law and in view of the fact that crimes against the security of the State and against public order are already punishable under the present Criminal Code (and will also be so under the new Criminal Code which is in the process of being drafted), the Anti-Subversion Law should be repealed;

(g) A national commission on human rights should be established (on the proposal of the Interdepartmental Committee on Human Rights, see para. 13 above). The primary task of such a commission should be to educate authorities and officials in the field of human rights;

(h) An authority or agency should be established where victims of human rights violations (e.g. torture) can file their complaints. Such an agency should have independent investigative powers. Local offices of a national commission on human rights could function as such an agency;

(i) A system of regular visits to all places of detention, including police stations, by an independent authority should be established. Local offices of a national commission on human rights could be entrusted with this task;

(j) Officials who have been found guilty of committing or condoning torture or other cruel, inhuman or degrading treatment should be severely punished;

(k) Jurisdiction over offences committed by members of the armed forces, including the police, should be given to the civilian courts.